

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5112 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Nos. 1 to 5 No

NATWARSINGH BHARTHAJI VIHOL

Versus

COMMISSIONER OF POLICE

Appearance:

MR NM KAPADIA for Petitioner
MISS.SIDDHI TALATI, AGP. for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 23/12/98

ORAL JUDGEMENT

In this writ petition under Article 226 of the Constitution of India the detention order dated 12.5.1998 passed by the Police Commissioner, Ahmedabad under section 39(2) of the Prevention of Antisocial Activities

Act, 1985 (for short 'PASA Act') is under challenge with prayer that the said order be set aside and the detenu be released from illegal detention.

From the grounds of detention it appears that three cases under Prohibition Act were registered against the detenu in the month of August and October, 1997. The detenu was considered to be a bootlegger because he was engaged in business of country made liquor. The activities of the detenu in connection with bootlegging business were found to be prejudicial for maintenance of public order. Two witnesses who on account of fear of the detenu requested the sponsoring authority not to disclose their names and addresses had also narrated two incidents and on the strength of registered cases and two incidents narrated by the two witnesses the detaining authority came to subjective satisfaction that the detenu is a bootlegger and his activities were prejudicial for maintenance of public order. Accordingly the impugned order was passed which has been challenged in this writ petition.

At the time of arguments only two points were raised by the learned Counsel for the detenu. The first point was based on the basis of subsequent amendment incorporated in the writ petition that the representation dated 2.7.1998 sent through the Advocate by registered post on 3.7.1998 was returned by the State Government on 6.7.1998 with objection that there was no signature of the detenu. From the record it appears that other representations were also made by the detenu on 31.10.1998 and 3.9.1998. Another representation was made on 3.9.1998 by the brother of the detenu which after careful consideration was rejected by the State Government on 10.9.1998. It has been contended that the first representation dated 2.7.1998 could not be returned on technical objection that it did not bear signature of the detenu. It was urged that since this representation was sent by the Advocate of the detenu under instructions from the detenu, the signature of the detenu was not required and this representation should have been considered. Cabron copy of the said representation has been filed which shows that it was sent under the instructions by the Advocate of the detenu. As such there was no necessity to obtain signature of the detenu. This representation has not been decided so far. There was no obligation on the part of the Advocate of the detenu to resubmit it after making compliance which was totally uncalled for. Non consideration of this representation by the State Government on merit has rendered the detention and continued detention of the

detenu illegal. On similar facts the Apex Court in the case of Balchand Chorasia Vs. Union of India, AIR 1978 SC Pg.297 observed that such representation sent by the Advocate of the detenu should not have been technically dealt with, rather it should have been dealt with on merits inasmuch as valuable right of the detenu was going to be affected . On this ground the detention order becomes illegal.

So far as the second representation dated 31.8.1998 is concerned, para 3 of the counter affidavit of Shri J.R.Rajput, Under Secretary, Government of Gujarat shows that no such representation was received in the Home Department. No rejoinder has been filed against this counter affidavit. As such it is not proved that representation dated 31.8.1998 was received by the Home Department. If representation of this date was not received it could not be considered and as such on this ground the impugned order of detention does not become illegal.

The third representation was sent by the detenu on 3.9.1998, through, District Jail Superintendent, addressed to Secretary, Home Department. Certain documents were demanded. The State Government directed the detaining authority to consider the detenu's demand of additional documents. The Commissioner of Police gave suitable reply to the detenu. It appears that in this representation only documents were demanded and there was no prayer for revocation of detention order. As such it was sent to the Commissioner of Police for necessary orders. No violation of Article 22(5) of the Constitution of India has thus been made.

The third representation dated 3.9.1998 was sent by the brother of the detenu which was rejected on 10.9.1998. This representation was received in the office of the Chief Minister on 4.9.1998. It took some time to travel from the office of the Chief Minister to other department. There was thus no delay in disposal of this representation.

However, non consideration of the first representation dated 2.7.1998 rendered the detention order and continued detention of the detenu illegal. On this ground the impugned order can be quashed.

Another ground to assail the detention order has been that the activity of the detenu cannot be said to be prejudicial for maintenance of public order. On this point the detaining authority placed reliance upon three

registered cases under Bombay Prohibition Act and also placed reliance upon statements of two confidential witnesses. From these materials the detaining authority was justified in reaching subjective satisfaction that the petitioner is a bootlegger. However, a bootlegger cannot be preventively detained simply because he is engaged in such business. He can be preventively detained only when the activities are prejudicial for maintenance of public order. For these three registered cases under Bombay Prohibition Act did not furnish any indication that on those three occasions the detenu created any obstruction to the search and seizure or created any situation prejudicial for maintenance of public order. As such these cases cannot be considered for holding that the detenu's activities were prejudicial for maintenance of public order.

Then remains the statements of two confidential witnesses who narrated about two incidents of 17.4.1998 and 20.4.1998. In the first incident the witness was suspected by the petitioner to be police informer. He was given threat by touching knife. People of surrounding area collected and seeing them the detenu abused them and went towards them with knife. People started running from there as a result of which atmosphere of fear and danger was created. This incident by itself cannot be said to have potentiality of disturbing even tempo of the life of the locality or community or area where such incident took place. Merely on suspicion that the witness was a police informer, if he was beaten and threatened on the point of knife it remained incident between the detenu and the witness. The learned Assistant Government Pleader however contended that the incident took place near Santoshi Mata Temple which is public place and members of public who gathered at the spot were also threatened. Hence, the activities of the detenu were not confined against the witness only but public at large was also affected. Santoshi Mata Temple may be a public place but that by itself is not enough to hold that the public order was disturbed in the locality. Even if such incident took place on public road it cannot be said that public order was disturbed. If the members of the public ran for safety for a short while due to the activity of the detenu, it cannot be said that the incident was of such potential nature , that it had disturbed even tempo of life of the community.

The second witness gave the statement that the detenu asked him to keep certain quantity of liquor in his house

and on refusal of the witness similar activity was repeated by the detenu. In M.J.Shaikh Vs. M.M.Mehta, Commissioner of Police, 1995(2) GLR 1268 similar incident was under consideration before the Apex Court where the detenu on the point of revolver threatened the witness and members of public who collected at the spot. These incidents were not considered by the Apex Court to have potentiality which was likely to disturb the public order. As such these two incidents are under consideration in this case against the detenu cannot be said to have disturbed the public order and on this ground as well the detention order becomes illegal.

For the reasons given above, the writ petition succeeds and is hereby allowed. The impugned order of detention dated 12.5.1998 is hereby quashed. The detenu shall be released forthwith unless wanted in some other case.

Sd/-
(D.C.Srivastava, J)

m.m.bhatt